

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of:

Application of Section 73.606(b),  
Table of Allotments, Television  
Broadcast Stations and Section 73.622(b),  
Table of Allotments, Digital Television  
Broadcast Stations (Buffalo, New York)

MM Docket No. 98-175

98-9364

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**OPPOSITION TO MOTION TO STRIKE  
PETITION FOR EMERGENCY RELIEF**

The Coalition for Noncommercial Media ("CNM"), by counsel, respectfully opposes the December 14, 1999 "Motion to Strike 'Petition for Emergency Relief'" filed by Western New York Public Broadcasting Association ("WNYPBA").<sup>1/</sup>

No harm would be done by considering CNM's Petition for Emergency Relief. Indeed, striking such a pleading would be unprecedented. The Commission seldom strikes pleadings in a case that raises important public policy questions. In this instance, with the pleading cycle over, a petition for emergency relief was the only means by which CNM could ask the Commission to act

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<sup>1/</sup> On the same day, WNYPBA filed another motion to strike, directed at an amicus filing by Citizens for Independent Public Broadcasting ("CIPB"). Therein, WNYPBA contended that CIPB's pleading should be stricken because CIPB is a "national" organization with no "expertise to offer". WNYPBA Motion to Strike Amicus at 2. CIPB, whose board includes such distinguished citizens as Nolan Bowie, George Gerbner and Nicholas Johnson, has extensive expertise in this area. National organizations regularly serve with distinction as amici in cases such as this, where a facially local dispute raises national policy issues. See, e.g., Waters Broadcasting Co., 91 FCC2d 1260, 1263 n. 3 (1982), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (1984), cert. denied, 470 U.S. 1027 (1984) (granting national group's request to serve as amicus in landmark comparative hearing case raising program diversity issues.)

WNYPBA's Motion to Strike Amicus also repeated the erroneous claim that CNM is not a local Buffalo organization. Actually, all of CNM's members reside in or near Buffalo, as WNYPBA well knows since WNYPBA's President has met with the group.

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immediately to avoid a scenario that would forever destroy two-channel noncommercial TV in Buffalo, frustrate the Commission's longstanding noncommercial broadcasting policies, and deprive the Commission of an opportunity to decide this case on the merits.

As WNYPBA acknowledges, CNM's Petition for Emergency Relief was necessitated by a November 15, 1999 published report in Communications Daily. Therein, WNYPBA's President, Don Boswell, announced WNYPBA's imminent plans to LMA WNEQ-TV to a commercial entity and allow it to operate WNEQ-TV commercially, evidently without prior Commission approval. See CNM Petition for Extraordinary Relief at 3.

This unprecedented step would frustrate the Commission's longstanding policy against converting markets with two noncommercial TV stations into markets with only one. Such a step would be especially unfortunate because a far less drastic alternative is readily available: attempting to sell WNEQ-TV to another noncommercial entity. Two days ago, the Commission approved just such a sale in the Pittsburgh public TV case.<sup>2/</sup>

If WNYPBA goes through with its plans to LMA WNEQ-TV to a commercial entity, it will deprive the Commission of the opportunity save two-channel noncommercial television in Buffalo. While it is easy to morph a noncommercial station into a commercial one, it is virtually impossible to change it back to noncommercial

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3/ See Deletion of Noncommercial Reservation of Channel 16, 482-488 MHz, Pittsburgh, PA, 11 FCC Rcd 11700 (1996) (denying dereservation proposal where sale to noncommercial entity was possible); Public Notice, "Commission Adopts an Order Approving Applications for Consent to Assign WQEX(TV), Channel \*16, Pittsburgh, Pennsylvania, and WPCB-TV, Channel 40, Greensburg, Pennsylvania" (released December 15, 1999) (approving noncommercial station's sale to a new noncommercial entity).

operation. The equitable unfairness to innocent investors attendant to forcing a profit-making business to cease operating are self-evident, and in our recollection the Commission has never done such a thing.<sup>3/</sup> That is why WNYPBA's openly-announced LMA plan threatens to poison WNEQ-TV as a potential candidate for ultimate sale to any noncommercial entity.

In its Motion to Strike, WNYPBA could not have been more evasive about its plans, failing even to acknowledge that its own President had announced WNYPBA's LMA plans in Communications Daily.<sup>4/</sup> However, WNYPBA did not deny that Communications Daily's published report was accurate, and it did not deny that it intends to place WNEQ-TV into a commercial LMA. Nor did WNYPBA address the central argument in CNM's Petition for Extraordinary Relief -- that until the full Commission considers the sensitive policy questions attendant to shutting down a second noncommercial station, no one should be permitted to use an LMA to shut down such a station.

The national policy implications of this case were underscored by CIPB's amicus pleading. This blue ribbon organization has cogently made the case for emergency relief in light of decades of Commission policy favoring multi-channel noncommercial television service.

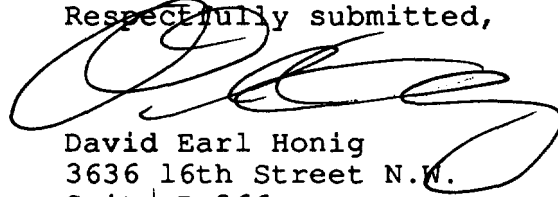
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<sup>3/</sup> Only one instance of a voluntary conversion from commercial to noncommercial operation comes to mind -- Post-Newsweek's donation of its unprofitable WTOP-FM (now WHUR-FM) to Howard University. That happened in 1971 -- 28 years ago.

<sup>4/</sup> Certainly, a party should not have a press account charged against it when it has no means of verifying the accuracy of what was reported. But here, WNYPBA's own President made the statement in question on the record to a publication which is a journal of record in the communications industry. He knows what he said. He and WNYPBA should be estopped from suggesting that the published report is mere "hearsay." WNYPBA Motion to Strike at 4.

The Commission should deny WNYPBA's Motion to Strike and grant the Petition for Emergency Relief, thereby preventing the imminent destruction of two-channel noncommercial television service in Buffalo.

Respectfully submitted,



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December 17, 1999

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 17th day of December, 1999 caused the foregoing "Opposition to Motion to Strike 'Petition for Emergency Relief'" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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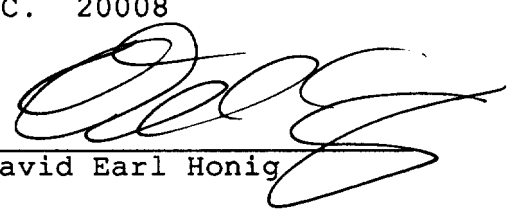
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